

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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Application of

ECHOStar COMMUNICATIONS CORPORATION,
 GENERAL MOTORS CORPORATION,
 HUGHES ELECTRONICS CORPORATION,

Transferors,
 and

ECHOStar COMMUNICATIONS CORPORATION,

Transferee,

For Authority to Transfer Control.

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

CS Docket No. 01-348

To the Commission and Chief Administrative Law Judge:

OPPOSITION TO PETITION TO INTERVENE
AND SEEK CONTINUANCE OF HEARING

EchoStar Communications Corporation ("EchoStar"), General Motors Corporation ("GM") and Hughes Electronics Corporation ("Hughes"), a subsidiary of GM (collectively, the "Applicants"), hereby oppose the Petition By Advanced Communications Corporation ("Advanced") **To Intervene and Seek Continuance of Hearing.**¹ In its Petition, Advanced belatedly attempts to inject itself into this hearing even though it has failed to participate in this proceeding to date, and it also has failed to assert its alleged rights in prior proceedings regarding the transfer of the 110° W.L. orbital location. Advanced does so in an effort to resurrect issues that have been repeatedly adjudicated against Advanced since as early

¹ See Petition By Advanced Communications Corporation To Intervene and Seek Continuance of Hearing. CS Docket No. 01-348 (filed Nov. 1, 2002) ("Petition").

as 1995 -- first by the International Bureau, then by the full Commission, then in 1996 by the U.S. Court of Appeals for the D.C. Circuit, and then in 2001 by the U.S. Court of Appeals for the Eighth Circuit and again by the D.C. Circuit. **As** discussed herein, the Advanced Petition is groundless and should **be** denied.

I. ADVANCED IS NOT A PARTY IN INTEREST

Advanced contends that it is a “party in interest” in this proceeding “because it claims an interest in the direct broadcast satellite (“DBS”) orbital locations at 110 degrees W.L. and 148 degrees W.L. and associated channel frequencies (the “Disputed Assets”) that are part of the proposed transaction.”” As the Advanced Petition acknowledges, however, the Commission canceled Advanced’s permit for frequencies at those two locations in 1995, upholding a Bureau ruling earlier that year to the same effect. In 1996, that decision was upheld by the Court of Appeals for the D.C. Circuit,³ and the Supreme Court denied Advanced’s petition for a writ of certiorari. Undaunted, Advanced attempted to attack the Commission’s decision in a separate civil proceeding, but its complaint was dismissed by a federal district court on the basis of collateral estoppel, and this dismissal was affirmed by the **U.S.** Court of Appeals **for** the Eighth Circuit. *Advanced Comm. Corp. v. MCI Communications, Inc.*, 263 F.3d 793 (8th Cir. 2001). In October 2001, Advanced proceeded to petition the D.C. Circuit for a writ **of** mandamus directing

² Petition at I.

³ *See id.*, **Exh. A** (Petition to Reopen Case Based on Recently Obtained, Previously Unavailable Evidence) at 2-11. In April 1995, the FCC International Bureau denied Advanced’s request to extend its DBS system implementation milestones. *Advanced Communications Corporation*, FCC No. DBS-94-1 IEXT, FCC 95-944, Memorandum Opinion and Order (rel. Apr. 27, 1995). In October 1995, the Commission affirmed the International Bureau’s decision, *see Advanced Communications Corporation*, FCC No. DBS-94-1 IEXT, FCC 95-428, Memorandum Opinion and Order (rel. Oct. 18, 1995) (“*Advanced Order*”), and subsequently auctioned the orbital locations previously assigned to Advanced. The U.S. Court of Appeals for the D.C. Circuit upheld the Commission’s ruling. *Advanced Comm. Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996)(unpublished opinion), *cert. denied* 519 U.S. 1071 (1997).

the Commission to declare void the *Advanced Order* based on certain affidavits from former Commissioners, but that petition too was denied on December 19, **2001**. Advanced then filed a Petition to Reopen with the Commission based on the same affidavits.

Advanced cannot establish a sufficient nexus to these orbital locations by relying on the completely extraordinary and frivolous challenge to a decision made by the Commission seven years ago and upheld by two courts of appeals. Advanced's Petition to Reopen, filed with the Commission in April **2002**, is based on a very unusual rationale -- affidavits sworn out in October **2001** by two former Commissioners about alleged flaws in the FCC's decisionmaking process. Advanced makes no showing whatsoever that it has any likelihood to succeed in this effort. Indeed, the D.C. Circuit has already denied Advanced's petition for a writ of mandamus, which had been based on the same rationale. Of course, the cancellation of Advanced's permits remains fully effective and has not been stayed by the Commission in anticipation of a decision on Advanced's Petition to Reopen. In fact, after dismissal of Advanced's claims by two courts of appeals three times and denial of certiorari by the Supreme Court, it is difficult to imagine a more final and definitive agency action than the cancellation of Advanced's permits.

Indeed, Advanced appears to have discovered its interest in this proceeding with undue delay: the merger was placed on public notice on December **21, 2001**. Yet Advanced failed to file a petition or comments asserting its alleged interest at that time, even though it had already discovered the alleged flaws in the FCC's decisionmaking process and had already filed its petition before the D.C. Circuit. Nor did Advanced participate in prior proceedings involving these orbital locations -- such as the transfer of the permit for the 110° W.L. orbital location from MCI to EchoStar, and the Commission's approval of launching two EchoStar satellites, EchoStar V and EchoStar VIII, to that location.

In any event, the Commission's rules indicate that Advanced may not be able to obtain party status at the hearing solely on the basis of an alleged interest in this proceeding. Section 1.223(a) provides that any person may file a petition to intervene based on its party in interest status "in cases involving applications for construction permits and station licenses, or modifications or renewals thereof."⁴ Under the language of Section 1.223(a), a petition for intervention based solely on the party's alleged interest does not appear to be available in this transfer of control proceeding.⁵ In apparent recognition of this, Advanced tries (and, as described below, fails) to make a case for intervention under Section 1.223(b) of the Rules.

II. ADVANCED HAS NOT OTHERWISE DEMONSTRATED THAT IT SHOULD BE GRANTED PARTY STATUS

Section 1.223(b) of the Commission's Rules provides that any party may be granted leave to intervene in any hearing by demonstrating, among other requirements, that its participation will assist the Commission in the determination of the issues in question.⁶ Advanced has made no such showing.

Before filing its Petition, Advanced had not deemed it necessary to file comments in this proceeding. Now, Advanced suggests only that its "participation should assist the Commission because the relief sought in this petition and in the Petition to Reopen may result in the amelioration and mitigation of one of the Commission's anticompetitive concerns regarding

⁴ 47 C.F.R. §1.223(a).

⁵ The Commission's discussion of intervention procedures in Paragraph 298 of the *Hearing Designation Order* is viewed properly as a description of the intervention mechanisms set forth in Section 1.223 rather than a substantive decision that all such mechanisms are available in this proceeding. See *In the Matter of Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee*, Hearing Designation Order, CS Docket No. 01-348, FCC No. 02-284 at ¶ 298 (rel. Oct. 18, 2002) ("*Hearing Designation Order*").

⁶ 47 C.F.R. §1.223(b).

the Applicants’ proposed merger.”” Because it has no permit of any sort for any DBS spectrum, Advanced is no different from any company that is not a participant in the MPVD market. [I]f the standard for participation was as open-ended as Advanced asserts, any party would be able to come in at this stage and litigate its views that it should be given access to DBS spectrum and that such access would ameliorate the Commission’s competition concerns. Such participation would be of no assistance to the Commission. Advanced’s claim to participation, then, turns on a permit cancelled seven years ago and a seven-year late petition to reopen those proceedings. As explained above, however, such an extraordinary challenge cannot be the basis for Advanced’s participation in the proceeding. The Commission decision canceling Advanced’s permits was upheld by the D.C. Circuit twice and remains in full force and effect.

III. IN ANY EVENT, THERE IS NO BASIS UPON WHICH TO GRANT ADVANCED’S REQUEST FOR A CONTINUANCE

Advanced supports its request for a continuance with a single sentence, claiming that “good cause exists for continuing the hearing until final adjudication of Advanced Communication’s [sic] Petition to Reopen, including any appeals if necessary, because if Advanced Communications obtains rights to the Disputed Assets, one of the Commission’s anticompetitive concerns in the Hearing Designation Order will be ameliorated or mitigated.”” Thus, rather than demonstrating specific reasons that there is good cause for continuing the hearing, Advanced merely seeks to rely on the pendency of its Petition to Reopen to delay action in this proceeding.

However, the pendency of Advanced’s Petition to Reopen does not establish good cause for a continuance. The Commission may move forward with this proceeding *and make a*

¹ Petition at 5.

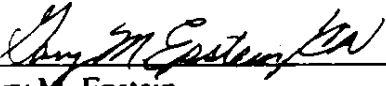
⁸ Petition at 5.

final decision without regard to the ultimate disposition of Advanced's latest challenge, just as the Commission **did in** moving forward with the DBS auction in **1996** or ruling on the subsequent transfer of the 110° W.L. **DBS** license from MCI to EchoStar during the pendency of Advanced's numerous prior unsuccessful challenges. Moreover, as explained above, there is no reason to believe Advanced's extraordinary challenge has any greater likelihood of success, particularly since the D.C. Circuit **has** already denied Advanced's petition for a writ of mandamus, which had been based on the same rationale as Advanced's Petition to Reopen. In view of the foregoing, the Commission should not and indeed cannot properly rely on the mere pendency of the Petition to Reopen as a basis for continuing the hearing.

IV. CONCLUSION


For the reasons set forth herein, the Advanced Petition should either be dismissed or denied by the Commission.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Todd B. Lantor of Steptoe & Johnson, hereby certify that on *this* 13th day of November, 2002, a copy of the foregoing ~~was~~ sent by first-class ~~mail~~ to the following persons or entities:

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